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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL FRANCIS REYES DOMINGUEZ, Defendant and Appellant.	A155977 (San Francisco City & County Super. Ct. No. 18001949)

INTRODUCTION

A jury convicted defendant Miguel Francis Reyes Dominguez of one count each of exhibiting a deadly weapon (Pen. Code, § 417, subd. (a)(1)),[1] misdemeanor spousal abuse (§ 243, subd. (e)(1)), misdemeanor false imprisonment (§ 236), and felony dissuading a witness (§ 136.1, subd. (b)(2)). On appeal, he challenges the trial court's decision not to reduce his felony conviction for dissuading a witness, a "wobbler," to a misdemeanor. We affirm.

BACKGROUND

Defendant met M.D. about eight or nine years ago when they worked together in a restaurant. M.D. and defendant began dating, but had separated prior to the night in question.

On that night, defendant asked M.D. if she would have dinner with him. She declined, stating she was planning to go dancing with her cousin. Later that night,

[1] All further statutory references are to the Penal Code.

defendant went to a bar where he saw M.D. with a male coworker. Defendant approached M.D., insulted her, and demanded an explanation. He appeared angry, and the bartender asked him to leave.

Defendant left and returned to his car parked in front of M.D.'s residence.

Meanwhile, at the bar, M.D. was nervous because she knew defendant was angry and that he would go back to her residence and wait for her. She therefore asked her coworker to take a taxi home with her, hoping defendant would refrain from accosting her if her coworker was there. When they arrived at her residence, they found defendant outside in his car, waiting. M.D. got out of the cab and walked toward her apartment. Defendant got out of his car, approached her, called her a "whore," and demanded an explanation for why she had lied to him.

Defendant followed M.D. towards her apartment, where they continued to argue. He then grabbed M.D.'s arm and shook her.

The coworker, who was also outside, told defendant they should work out their problems. Responding that the problem was between himself and M.D., defendant began insulting the coworker, and as he approached the coworker, defendant pulled out a knife and pointed it at M.D.'s waist. When defendant said he could "put an end to all of this," M.D. thought he would use the knife on her. Defendant then pointed the knife at M.D.'s neck, about four or five inches from her face. Fearing defendant might hurt her, M.D. ran towards the street to get away and asked her coworker to call the police.

Officers arrived within minutes and detained defendant just outside M.D.'s residence. They found a knife on the ground under a parked car, close to where defendant was detained.

A few days after the incident, defendant sent M.D. several text messages. One said: " '[M.D.], I only want to ask you one last favor. I have court on Thursday, the 8th of this month. I don't know if you or that guy are going to come forward. Just so that they don't file charges and don't give me another court date, say they don't want problems. Thank you. Please.' " Another message said: " 'They told me that if you don't come forward to court to testify, they will get rid of it. Please erase messages.' "

M.D. understood these messages to mean defendant wanted her not to appear in court to testify, or to drop the charges.

Defendant testified on his own behalf and denied that he had threatened M.D. or grabbed her. He stated he sent the text messages because he was confused and had no one else to talk to. Defendant also called a character witness who testified defendant was honest, hard-working, and a dependable employee.

Defendant was charged with six counts: (1) making a criminal threat (§ 422); (2) exhibiting a deadly weapon (§ 417, subd. (a)(1)); (3) misdemeanor spousal abuse (§ 243, subd. (e)(1)); (4) misdemeanor false imprisonment (§ 236); (5) felony dissuading a witness (§ 136.1, subd. (b)(2)); and (6) disobeying a domestic relations court order (§ 273.6, subd. (a)).[2]

The jury found defendant guilty of counts 2, 3, 4, and 5, not guilty of count 6 and was unable to reach a verdict on count 1. The trial court sentenced defendant to 90 days in county jail, three years' formal probation, and ordered defendant to pay various fines and fees.

DISCUSSION

In his sentencing memorandum, defendant asked the trial court to reduce the dissuading a witness count to a misdemeanor under section 17, subdivision (b).[3]

At the sentencing hearing, defense counsel emphasized the only other counts on which the jury had returned a verdict were misdemeanors, and that the one felony conviction—for dissuading a witness—was based on conduct that was "nonviolent, non-

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[2] Count 5 was originally charged as a misdemeanor. The prosecution subsequently filed a motion to amend the charge to a felony, which the trial court granted.

[3] Section 17, subdivision (b)(3) states, in pertinent part, "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail it is a misdemeanor for all purposes under the following circumstances: [¶] . . . [¶] (3) When the court grants probation to a defendant and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor."

threatening" and was a plea for mercy more than anything else. Counsel also pointed to other mitigating factors: defendant's other convictions were based upon misdemeanor conduct, defendant did not have a criminal record, this was a one-time offense, he maintained gainful employment, and he had "been very respectful during the court proceedings."

The trial court denied the motion, stating it had reviewed the probation report and sentencing memoranda, and taken into account the evidence adduced at trial. The court stated that given "the totality of the circumstances," it could not minimize defendant's conduct. The court acknowledged the jury had been unable to reach a verdict on the criminal threat count. However, the jury had convicted defendant on the other counts. Thus, "[t]he fact of the matter is the jury made a finding that he did, in fact, exhibit that knife in a fashion and held it in an approximate vicinity of the victim's throat." That, said the court, was conduct it could not condone. It also found defendant's denial of his actions and attempt to minimize them as nothing more than "an argument between a romantic couple," "not credible."

A trial court has broad discretion under section 17, subdivision (b), in deciding whether to reduce a "wobbler" offense to a misdemeanor. (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977–978.) The " 'burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary.' " (*Id.* at p. 977.) When deciding whether to reduce a sentence on a wobbler offense, the court considers " 'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.' " (*Id.* at p. 978.)

Defendant maintains the trial court abused its discretion because the circumstances underlying his dissuading conviction were an "aberration" and he had a "good work history, and lack of criminal record." He asserts the "facts concerning count five are about as benign as possible," "did not contain an express or implied threat of violence," and were more a "pathetic plea for mercy rather than attempt to undermine the judicial process." He further asserts the trial court "erred by relying on a conviction for which the

jury was hung as a factor warranting the denial," and erred in referencing his misdemeanor convictions on counts 2, 3, and 4.

The trial court's sentencing decision was neither irrational nor arbitrary. It considered the nature and circumstances of the offense, and defendant's attitude toward it. The court did not disregard the countervailing considerations to which defense counsel pointed, including defendant's work history and lack of a criminal record. Rather, the court concluded that other considerations, including the gravity of all the circumstances, such as putting a knife to the victim's throat, and defendant's denial of culpability and efforts to minimize his conduct, warranted the felony conviction. In short, defendant has essentially reargued his case before this court, rather than heeded the standard of review and identified an abuse of discretion by the trial court. (See *People v. Sy* (2014) 223 Cal.App.4th 44, 66 [" ' " 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' "].)

The trial court did not commit legal error by referring to the jury's failure to return a verdict, and hanging 11-to-1, on the criminal threat count. What the court pointed out was that despite having hung on that count, the jury did return verdicts on three of the other counts and therefore found that defendant did, in fact, put a knife to the victim's throat (and also committed abuse and false imprisonment).

Nor did the court commit legal error by referencing the conduct underlying these three misdemeanor convictions. In deciding whether to reduce a "wobbler" to a misdemeanor, the trial court properly considers the entire context in which the criminal conduct occurred. (See *People v. Bonilla* (2018) 29 Cal.App.5th 649, 661 [affirming denial of motion to reduce felony conviction to a misdemeanor where trial court considered " 'the evidence from the trial' " and found " 'the conduct of the defendants was unreasonable on the date of the incident, and truly outrageous in the whole context of things' "].) While defendant asserts the conduct the trial court referenced "cannot rationally support treating a separate count as a felony" because it "was misdemeanor conduct as reflected by the verdicts to counts two, three, and four," he cites no authority in support of this assertion. Furthermore, that defendant committed other misdemeanor

offenses does not change the fact that dissuading a witness can be charged and punished as a felony offense. (See *People v. Tran* (2015) 242 Cal.App.4th 877, 886 ["The reduction of a wobbler to a misdemeanor is not based on the notion that a wobbler offense is 'conceptually a misdemeanor.' "].)

Defendant has not demonstrated that the trial court abused its discretion in declining to reduce his felony conviction to a misdemeanor. (See *Alvarez, supra*, 14 Cal.4th at p. 981 ["Applying the extremely deferential and restrained standard by which appellate courts are bound in these matters, we find the trial court did not abuse its discretion. Whatever conclusions other reasonable minds might draw, on balance we find the decision tolerable given the court's broad latitude."].)[4]

DISPOSITION

The judgment of conviction is affirmed.

[4] Defendant also maintains in passing that the "due process clause required the trial court to reduce count five to a misdemeanor conviction." He cites no authority that supports this assertion, and it appears defendant has simply affixed a constitutional label to his abuse of discretion argument, which does not imbue either assertion with merit.

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Banke, J.

We concur:

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Humes, P. J.

_____
Sanchez, J.

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